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# Supreme Court of the United States

OCTOBER TERM, 1947.

No. 129

WILLIAM T. URIE, PETITIONER,

VS.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC.

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WILLIAM T. URIE, PETITIONER,

VS.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, William T. Urie, respectfully petitions for a Writ of Certiorari to review the final judgment and decision of the Supreme Court of Missouri *en banc*, the highest court of the State, reversing a judgment for Thirty Thousand Dollars ($30,000) in favor of petitioner and against Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, in an action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404 and the Boiler Inspection Act (45 U. S. C. A., Sec. 23), 43 Stat. 659.

## OPINIONS BELOW.

The opinion of the Supreme Court of Missouri *en banc* is reported in *Urie* v. *Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation*, 210 S. W. 2d 98 (not yet officially reported). Copy of Opinion (R. 20 *et seq.*). The opinion of the Missouri Supreme Court on the first appeal is reported in 352 Mo. 211, 176 S. W. 2d 471.

## JURISDICTION.

This action arose and was determined under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) and Federal Boiler Inspection Act (45 U. S. C. A., Sec. 23, *et seq.*) for damages for silicosis contracted while serving as a fireman in passenger service. The Missouri Supreme Court held that petitioner had no right of action under the Federal Acts relied on for recovery. The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code as amended by the act of February 13, 1925 (Title 28, U. S. C. A. 334 (a), 334 (b)). The judgment of the Supreme Court of Missouri *en banc*, the highest court in the State of Missouri, was entered on the 8th day of March, 1948 (R. 34), and petitioner's motion for rehearing was denied by that court on April 12, 1948 (R. 38), making the judgment final. Cases believed to sustain jurisdiction are:

*Lilly* v. *Grand Trunk R. R. Co.*, 317 U. S. 481, 87 L. Ed. 411.

*Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 89 L. Ed. 465.

*Ellis* v. *U. P. R. Co.*, 329 U. S. 649, 91 L. Ed. 572.

## STATUTES INVOLVED.

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) and the Federal Boiler Inspection Act (45 U. S. C. A., Secs. 23 and 32) are set forth in the appendix.

## QUESTIONS PRESENTED.

The petition alleged and the evidence showed that over a period of seven years up to May, 1940, petitioner worked as a fireman on passenger locomotives; that during this period, sand of a high silica content was used in sanders and as ballast (R. 2, 22, 23). Due to defective sanding devices and cab floors in the locomotives on which he worked, silica dust was caused to be drawn into the cabs and to be breathed by him, causing total disability from silicosis (2-4, 23-24).

We have for decision by this Court for the first time federal questions as follows:

1. Can an employee engaged in interstate commerce under the Federal Employers' Liability Act recover for injury caused by the gradual inhalation of harmful quantities of silica dust resulting from the violations by the carrier of the Federal Boiler Inspection Act in having the sanding appliances and decks of the cabs in an unsafe and defective condition over a period of years so as to cause harmful quantities of silica dust to be created and drawn up through the defects in the cabs and to be inhaled by the employee?

OR

Does the Boiler Inspection Act limit and restrict all rights of recovery of an interstate employee to

"accidental injury" and in the sense that the injury is "attended by force and violence"?

2. Is it actionable negligence for which a recovery may be had under the Federal Employers' Liability Act to use sand of a high and dangerous silica content in defective and out of order sanding equipment and on the roadbed when, because of the condition of the sanding equipment, unnecessary and excessive quantities of such sand escapes and is ground under the wheels causing excessive quantities to fog up and be drawn through large and unnecessary openings in the cab floors where engine men must inhale it in the course of their duties over a period of years causing silicosis,

OR

Isn't the railroad required in the exercise of reasonable care to anticipate that continued exposure to such silica dust will cause silicosis?

## STATEMENT.

Petitioner brought this action in a Missouri state court under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 *et seq.*) for negligence and for violations of the Boiler Inspection Act (45 U. S. C. A., Sec. 23) resulting in silicosis (R. 1, 43-45). A demurrer to the second amended petition was sustained by the trial court and petitioner appealed to the Supreme Court of Missouri. That court held as to charges of common law negligence: "We do not think that it would be reasonable to hold, under the facts admitted by demurrer, that defendant should have anticipated plaintiff's injury, and we therefore rule that the petition does not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act." As

to a cause of action for violations of the Boiler Inspection Act, the court held: "measured by the demurrer one of the omissions was failure to adjust the sanding machines, and by the demurrer the result of such omission is plaintiff's silicosis. We think the facts stated in the petition are sufficient to support recovery for breach of the Boiler Inspection Act." The case was remanded to the trial court (*Urie* v. *Thompson*, 352 Mo. 211; 176 S. W. 2d 471).

Upon remand, petitioner amended his petition in conformity with the opinion to more specifically allege violations of the Boiler Inspection Act (R. 1-4) and the case was tried before a jury (R. 8).

The petition as amended alleged and petitioner's evidence showed the following facts:

Petitioner worked as a locomotive fireman in interstate commerce, firing passenger locomotives on a run between Joplin and Kansas City, Missouri (R. 2, 22). On these runs the sanding devices of the locomotives were filled with mine tailings or chat consisting of approximately 97 per cent silicon dioxide (R. 2, 22, 23). The same silica material was used to ballast the roadbed (R. 2, 22). The sanding apparatus and the cab floors of these locomotives were in bad order and defective (R. 3, 4, 24). Silica dust escaping from the defective sanding apparatus and from the roadbed were sucked up through the openings in the cab floors by the speed of the moving locomotives and into the cabs where plaintiff was required to work (R. 2, 24). As a result of breathing harmful quantities of this silica dust over a period of years, petitioner contracted silicosis, which totally and permanently disabled him from May, 1940 (R. 2, 23).

The trial court gave petitioner's instruction No. 1 (R. 8-10) and the respondent's Instruction R (R. 13-14). These instructions required the finding of a violation of both the Federal Employers' Liability Act and the Federal Boiler Inspection Act and over a period of seven years, and that this caused silicosis. The jury returned a verdict for petitioner for Thirty Thousand Dollars ($30,000) upon which judgment was entered (R. 14).

Upon appeal, Division One of the Missouri Supreme Court reversed the case outright (R. 30). The case was transferred to the Missouri Supreme Court *en banc* where it was resubmitted, the opinion of Division One was adopted and judgment for respondent was entered (R. 34).

## BASES OF OPINION OF THE STATE COURT.

In passing upon the case and as a basis for its decision the Supreme Court of Missouri said: "Heretofore the case has been considered upon the question of the sufficiency of the petition * * *, it being held the petition stated facts sufficient to support recovery for a breach of the Boiler Inspection Act" (R. 21). After reviewing the pleadings, the Missouri Court said, "It is said by defendant that the petition does not state and the evidence does not support a claim under the Boiler Inspection Act" (R. 22). After detailing the evidence and considering the case of *Lilly* v. *Grand Trunk R. Co.*, the Missouri Court said, "in the former review this court ruled with the Lilly case that * * * it is unnecessary that there be alleged (or shown) a defect in construction or mechanical operation. It was said, 'the sanding device which is out of adjustment is an unsafe appliance, the very thing that the carrier, under the Boiler Inspection Act insures against'" (R. 25).

The court then sets out the nub of the present opinion as follows, "In the former review *this court did not treat with the contention that silicosis is not an evil at which the Act is aimed.* If none of the consequences which a statutory enactment was designed to guard against has resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted.

This brings us to a more particular examination of appellant-defendant's contention that the Boiler Inspection Act is designed to guard against 'accidental' injury, and that silicosis is not within the purview of the protection of the act". (Italics ours) (R. 25-26).

The court then stated: "There is a definite differentiation generally found in the adjudicated cases between accidental injury (accidental in the sense that the injury is attended by force or violence) and pneumoconiosis (including silicosis) * * *" (R. 27).

After considering Section 2 of the Boiler Inspection Act in the light of rules promulgated under it by the Interstate Commerce Commission, the history of the various safety appliance acts, Section 8 of the Boiler Inspection Act dealing with reports in case of accident from failure of a boiler and the preamble to the act, the court reached the following conclusion, "It seems to us the act (considering the language of the Act itself, its preamble, its history, and its ancillary regulations) is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts. The judgment should be reversed" (R. 30).

The above resume of the opinion of the Missouri Court shows that it constituted nothing more than a reconsideration and reversal of its first opinion. The court did not question the sufficiency of the evidence to support the allegations of the petition. It was conceded that the peti-

tion pleaded and the evidence supported the jury's finding that there were violations of the Boiler Inspection Act in the use and maintenance of defective sanding devices and defective cab floors which caused plaintiff's silicosis. Notwithstanding this, it was held that the demurrer to the petition should have been sustained on the first appeal.

## REASONS FOR GRANTING THE WRIT.

I.

This court has never had for decision an action for damages under the Federal Employers' Liability Act for negligence or for violations of the Boiler Inspection Act involving injuries other than "accidental injuries," and has therefore never directly passed upon the important question of whether there may be recovery in such an action for injuries not "attended by force and violence." The second opinion of the Supreme Court of Missouri recognized that the Interstate Commerce Commission, by virtue of the authority conferred by the Boiler Inspection Act, is empowered to and has enacted regulations aimed at protecting the health of enginemen, yet, it held that recovery for violations of the act is limited to "accidental injury" in the sense that the injury is "attended by force and violence" (R. 27-30). It recognized that recovery had been allowed for negligence under the Federal Employers' Liability Act resulting in silicosis but refused to apply such law where the injury occurred on a locomotive. This petition therefore raises substantial and important questions regarding the scope and extent of the protection afforded employees insofar as a recovery for injuries under the two acts is involved. The determination by the Missouri court is unquestionably contrary to the manner in which this court would have decided the case.

II.

The determination of the scope and effect of the Boiler Inspection Act by the Missouri Supreme Court is in direct conflict with controlling decisions of this court holding that the Boiler Inspection Act was *not* "intended solely to prevent accidental injury in the operation of trains," but "*was intended to occupy the field*" of protection of enginemen from all hazards. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207; *U. S. et al.* v. *B. & O. R. Co. et al.*, 293 U. S. 454, 55 S. Ct. 268; *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 87 L. Ed. 411.

III.

The opinion conflicts with decisions of this court holding that where any injury results to one for whose benefit a statute was enacted, from disregard of such statute the right to recover damages is implied. *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.*, 294 U. S. 529, l. c. 531, 55 S. Ct. 517; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, l. c. 61, 54 S. Ct. 573, l. c. 574; *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, l. c. 214, 54 S. Ct. 402, l. c. 405; *Davis* v. *Wolfe*, 363 U. S. 239, 243, 44 S. Ct. 64, 66; *L. & N. R. R. Co. et al.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 457; *T. & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, l. c. 484.

IV.

The Supreme Court of Missouri in construing the Boiler Inspection Act, has violated rules of statutory construction laid down by this court and other Federal courts in the following respects:

(a) In holding that the word "accident" as used in Section 8 modifies and limits the duty placed on the railroad by Section 2, to the requirement that locomotives be "safe" from "*accidental injury*," so that they may be employed without "peril to life or limb" from "*force and*

*violence.*" *Napier* v. *Atlantic Coast Line R. Co. et al.*, 272 U. S. 605, 47 S. Ct. 207; *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169; *In re Claim of A. E. Clark*, 27 Opinions of Attorney General 346; *In re Claim of Willard E. Jewell*, Opin. of Solicitor, Dept. of Labor, Apr., 1915, p. 261.

(b) In holding that the plain words and meaning of the Boiler Inspection Act are limited and overcome by the history and preamble of the act. *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826; *Tex. & Pac. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 484; *L. & N. R. Co. et al.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456; *Davis* v. *Wolfe*, 363 U. S. 239, 44 S. Ct. 64; *Swinson* v. *C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517; *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, 89 L. Ed. 921, 933; *Brotherhood of R. R. Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 529, 91 L. Ed. 1646, 1652; *Brady* v. *Terminal R. Assn. of St. Louis*, 303 U. S. 10, 58 S. Ct. 426.

(c) In considering regulations passed by the Interstate Commerce Commission under the act as limiting the benefits given an injured employee under the act. *Napier* v. *Atl. Coast R. Co.*, 272 U. S. 605, 613, 47 S. Ct. 207, 210; *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169.

(d) In distinguishing between injuries for which a recovery may be had for "negligence" under the Federal Employers' Liability Act and injuries for which recovery may be had for violation of the Boiler Inspection Act, instead of construing said acts *in pari materia* whereby violations of the Boiler Inspection Act constitute "negligence" for which "damages" may be recovered by employees "suffering injuries" as a proximate result thereof. *Napier* v. *Atl. Coast R. Co.*, 272 U. S. 605, 613, 47 S. Ct. 207, 210; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826; *Tex. & Pac. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 484; *L. & N. R. Co. et al.* v. *Layton*, 243

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*B. & O. R. Co.* v. *Branson*, (Md.) 98 Atl. 225, 229; *K. C. S. Ry. Co.* v. *Chandler*, (Tex. Civ. App.) 192 S. W. 2d 304, 310; *Jamison et al.* v. *Encarnacion*, 281 U. S. 635, 650, 50 S. Ct. 440, 442; *Rowsie* v. *Thomas F. Jackson*, 196 Atl. 617, l. c. 618; *Marsh* v. *Industrial Commission of Calif.*, 217 Calif. 338, 18 Pac. 2d 933, 936; *Wurst* v. *American Car & Foundry Co.*, (Mo. App.) 103 S. W. 2d 6, 16; *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497; *Atl. Coast Lines* v. *Wheeler*, 147 Va. 1, 132 S. E. 517; *C., R. I. & P. Ry. Co.* v. *Cheek*, 105 Okla. 91, 231 Pac. 1078; *Shelton* v. *Thompson*, 148 F. 2d 1, 157 F. 2d 709.

V.

The opinion of the Supreme Court of Missouri on prior appeal is in conflict with state and federal decisions under the Federal Employers' Liability Act in holding that although respondent used sand of a high and dangerous silica content in defective and out of order sanding equipment, because of which, unnecessary and excessive quantities of sand escaped and was ground under the wheels and excessive quantities were drawn into the cab where petitioner inhaled it over a period of years causing silicosis, the petitioner could not recover. *McComb* v. *County Commissioners*, 91 U. S. 1, 23 L. Ed. 185; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 33 S. Ct. 78; *Creason* v. *Harding*, 344 Mo. 452, 126 S. W. 2d 1179, 1183, 1184; *Smith* v. *Smith*, (Mo. App.) 192 S. W. 2d 691, 697; *Sadowski* v. *L. I. R. Co.*,

292 N. Y. 448, 55 N. E. 2d 497; *Shelton* v. *Thompson*, 148 F. 2d 1; 157 F. 2d 709; *B. & O. R. Co.* v. *Branson*, 128 Md. 678, 98 Atl. 225; *C., R. I. & P. R. Co.* v. *Cheek*, 105 Okla. 91; *Lillie* v. *Thompson*, 92 L. Ed. Ad. Op. 115.

It is essential that the writ be granted in order to determine important questions involving the interpretation of the Federal Employers' Liability Act and the Federal Boiler Inspection Act as to the type and nature of injuries which may be the subject of recovery and important questions as to the scope of the administration of the Acts insofar as protection of employees from injuries other than those attended by force and violence is concerned.

## PRAYER.

Wherefore, your petitioner prays that a writ of certiorari be issued out of this court, directed to the Supreme Court of Missouri, commanding said court to certify and send to this court a transcript of the record in the case entitled, "William T. Urie, respondent, vs. Guy A. Thompson, trustee of the Missouri Pacific Railroad Company, a corporation, appellant, number 39908," including also the proceedings in said Court, to the end that said cause may be reviewed and determined by this court and the judgment of the lower court reversed.

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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## STATEMENT OF CASE.

The facts with reference to the opinions below, jurisdiction of the court and the statutes involved have been sufficiently covered in the petition and will not be here repeated. The issues, the pleadings, and the evidence have likewise been discussed in the preceding petition so that they will not be repeated at this point.

## SPECIFICATIONS OF ERRORS TO BE URGED.

The Supreme Court of Missouri Erred:

1. In holding that the Boiler Inspection Act in requiring the locomotive to be "safe and suitable" and so as not to "expose to unnecessary peril" was intended to provide protection from accidental injury instead of protection from all hazards of employment in interstate commerce.

2. In holding that "accident" as used in Section 8 of the act limits and restricts the broad provisions of Section 2 of the act and the word "injury" in Section 1 of the Federal Employers' Liability Act to accidental injury.

3. In holding that the history and preamble of the act are to be used as aids to the construction of the unambiguous language of Section 2 of the act.

4. In holding that the scope of the act is limited by regulations of the Interstate Commerce Commission issued by virtue of Section 2 thereof.

5. In holding that even though an injury was suffered as a direct result of violations of the Boiler Inspection Act, there can be no recovery for the injury suffered.

6. In failing to construe the provisions of the Federal Employers' Liability Act *in pari materia* with the Boiler Inspection Act.

7. In failing to give effect to the unrestricted meaning of the word "injury" as used in the Federal Employers' Liability Act.

8. In denying recovery for negligence in maintaining and using the locomotives and their equipment, even though there is no statutory right given for violation of the Federal Boiler Inspection Act alone.

## ARGUMENT.

### I.

### Section 2 of the Boiler Inspection Act Is Plain and Clear, Is to Be Liberally Construed and "Was Intended to Occupy the Field" of Protection from All Hazards Instead of Being "Intended Solely to Prevent Accidental Injury in the Operation of Trains."

The Boiler Inspection Act is divided into two separate and distinct parts. The first part of Section 2 places a general obligation upon interstate carriers not to use any locomotive unless, "said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb * * *." This is a general obligation resting upon railroad companies entirely distinct from any inspection that may ever occur. The second part of the act creates a system of inspections under the chief inspector and district inspectors and provides for rules, regulations and reports. Section 2 would be entirely operative if no other part of the Bill had been enacted. Its requirements are entirely separate and distinct from the rest of the act (Cong. Hearings, Cong. R. 1246, Part 1, p. 729, Jan. 10, 1911). *Napier* v. *Atl. Coast Line R. Co. et al.*, 272 U. S. 605, 47 S. Ct. 207.

This action involves the obligation placed upon the railroads by Section 2 of the act. Its language is clear, definite and certain. *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 523-524, 45 S. Ct. 169, 170. "The act * * * is to be liberally construed in the light of its prime purpose, the protection of employees by *requiring the use of safe equip-*

*ment*" (Italics ours). *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 486, 87 L. Ed. 411, 415. There is no warrant in the language of the act for construing it so narrowly as to limit it to the requirement that a locomotive tender and its appurtenances be safe from "accidental injury" so that it may be employed without "unnecessary peril to life or limb" from "force and violence." As said in *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 87 L. Ed. 411, 416, "The act without limitation speaks of equipment 'in proper condition and safe to operate * * * without unnecessary peril to life or limb.'" Clearly the locomotives are not "safe to operate" and "without unnecessary peril to life or limb" within the requirements of the Act when sand of a high and dangerous silicia content is used in defective and out of order sanding equipment and used on the roadbed and because of such condition of the sanding equipment unnecessary and excessive quantities of such sand escape and are ground under the wheels and cause excessive quantities to fog up and because of large and unnecessary openings in the floors of the cabs such dust from such sanders and dust from the roadbed is drawn up through such holes into the cabs and where the fireman must inhale it while doing his work and over a period of years and it causes silicosis.

The Missouri court did not hold that the language of Section 2 was ambiguous; neither did it hold that continued exposure to silicia dust by reason of defective sanders and cabs did not render the locomotive and its appurtenances unsafe or was not an "unnecessary peril to life or limb." Yet it held that the act was not broad and inclusive enough to authorize recovery by an interstate employee for such violations. This holding directly conflicts with controlling decisions of this Court defining the scope of the act.

The Missouri Court misconstrued the case of *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207, and

its holding is in direct conflict therewith. That case required, "a determination of the scope and effect of the Federal Locomotive Boiler Inspection Act." The question was whether the act occupied the field of regulating locomotive equipment used in interstate commerce so as to preclude state legislation.

The court first set out Section 2 of the Boiler Inspection Act and said "Other sections confer upon inspectors and the Commission power to prescribe requirements and establish rules to secure compliance with the provisions of Section 2."

One of the state statutes in issue was a Georgia act requiring an automatic fire door. This court pointed out:

> "The automatic fire door conserves the health of the fireman by protecting him from exposure to extremes of heat and cold while performing his duties; conserves his eyesight by reducing the amount and extent of exposure to the glare of the fire * * *"

The Wisconsin regulation in question provided for cab curtains, the purpose of which was to protect engineers and firemen from exposure that "caused great discomfort and danger of serious illness."

This court said "each device was prescribed by the state primarily to protect the health and comfort of engineers and firemen."

In support of the claim that Congress had not occupied the entire field, the state's main argument was "that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure." The question as put by this court was: "Did Congress intend that there might still be state regulation of locomotives, if the meas-

ure was directed primarily to the promotion of the health and comfort, and affected safety, if at all, only incidentally?" In determining the case the court said:

> "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, *was intended to occupy the field*. The broad scope of authority conferred upon the Commission leads to that conclusion" (Italics ours).

While the case did not involve the question of a right of recovery for impairment of health, it did directly construe the scope and effect of the Boiler Inspection Act. The Interstate Commerce Commission could have exclusive authority under the act to prescribe new or additional devices only when they would protect the health and comfort of engineers and firemen against the danger existing to health and comfort without such changes, and because of the general and absolute duties placed upon the carriers by Section 2 of the act. Such regulations could only be validly promulgated upon a finding that they would remove the existing danger to health, or "unnecessary peril to life or limb." *U. S. et al. v. B. & O. R. Co. et al.*, 293 U. S. 454, 463, 464, 55 S. Ct. 268, 272.

The same finding is necessary in an action to recover damages for breach of the Boiler Inspection Act. If the act is broad enough to authorize the Commission to prescribe regulations to conserve the health of engineers and firemen on evidence that it will prevent, or remove the already existing, "unnecessary peril to life or limb," a recovery may be made by an employee for injury to his health from the condition which the Commission finds presents "unnecessary peril to life or limb." Under the opinion in Napier, a fireman gradually developing cataracts and loss of eyesight from continued exposure to the glare of the fire would surely be within the scope of protection afforded by the act. So would an engineman who

developed a cold and pneumonia from exposure to snow, wind and rain in an open cab.

In construing the Napier case the Missouri court said, "The reading of this case does disclose a tacit recognition of the validity of the State's argument that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains" (R. 27). This is a definite misinterpretation of the language of this court. The opinion expressly overrules the State's argument. At most the opinion discloses a tacit recognition of the validity of the statement that the Commission had theretofore made no regulations directed primarily to the prevention of impairment of health from the causes sought to be removed by the states, but it did not rule that the act itself did not require such protection to health. It held that the contention by the states, "if true, is not of legal significance."

The opinion is also in direct conflict with the construction of the act given it by this court in *U. S. et al. v. B. & O. R. Co. et al.*, 293 U. S. 454, 55 S. Ct. 268. This involved the power of the Interstate Commerce Commission to make an order under the Boiler Inspection Act requiring railroads to equip certain steam locomotives with power operated reverse gear instead of the hand reverse gear in use on 31,597 locomotives in the United States. The railroads challenged the jurisdiction of the Commission on the grounds that the procedure was unauthorized and that "a power reverse gear was not a safety device or appliance within the meaning of Section 2 of the Boiler Inspection Act."

In overruling this condition, the court said, l. c. 458:

> "First, the Commission clearly has authority, in an appropriate proceeding, to forbid the use of a locomotive *equipped* with a *manually operated* reverse gear, if, by reason thereof, the engine is *rendered unsafe or subjects employees of the railroad or others to*

*unnecessary peril to life or limb.* The substitution of power operated reverse gear for manually operated reverse gear might conceivably be found necessary to promote safety, *even if it did so only indirectly by preventing the impairment of the health of engineers through excessive exertion or fatigue.* To require the installation of power operated reverse gears is, in its nature, within the scope of the authority delegated to the Commission, for the power delegated to the Commission by the Boiler Inspection Act as amended is a general one" (Italics ours).

If the substitution of a power operated reverse gear could be ordered by the Commission to protect the health of employees it would have such power because the manually operated reverse gear would impair the health of the engineer or it would render the locomotive unsafe, or subject employees to "unnecessary peril to life or limb" within the meaning of Section 2 of the act, and because an engineer who suffered a nervous breakdown through excessive exertion or fatigue from using the manually operated reverse gear would be within the intent, scope and protection of the act. If so, an engineer suffering such breakdown could maintain an action for a violation thereof, even though the Commission had not exercised its power to issue such regulation.

Could it be held in the face of the Napier and B. & O. cases that the act is not broad enough to authorize the Commission to make regulations aimed at preventing injury from silicosis by keeping sanders in order and dispensing with openings in the decks or floors of cabs? Obviously not!

The Commission may issue such regulations, if locomotives exposing enginemen to silica dust constitute an "unnecessary peril to life or limb." If they do, they violate the act. If the act is violated, a right to recover is implied. Point II, *infra*.

II.

## Since Petitioner Was One of the Class the Act Was Passed to Protect, His Right to Recover Damages for Any Injury Resulting from Its Breach Is Implied in the Act.

In its prior opinion (*Urie* v. *Thompson*, 352 Mo. 211, 176 S. W. 2d 471), the Missouri Supreme Court held: "Plaintiff alleges that the omissions of defendant caused his silicosis. *Measured by the demurrer one of the omissions was failure to adjust the sanding machines, and by the demurrer the result of such omission is plaintiff's silicosis*" (Italics ours). In the present review, the Missouri Supreme Court did not overrule its prior holding that measured by demurrer to the petition and evidence, omissions under the Boiler Inspection Act resulted in Petitioner's silicosis. It held that Petitioner could not recover even though this were true.

On finding of a violation of the act and proximate cause, Petitioner's right to recover became fixed as a matter of law.

The so-called Boiler Inspection Act is one of the Safety Appliance Acts. A violation of such an Act proximately causing an injury gives a right of recovery. In *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.*, 294 U. S. 529, l. c. 531, 55 S. Ct. 517, this Court held: "The Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*) has been liberally construed so as to give *a right* of recovery *for every injury* the proximate cause of which was a failure to comply with a requirement of the Act" (Italics ours).

In *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, l. c. 61, 54 S. Ct. 573, l. c. 574, this Court in discussing the Federal Safety Appliance Acts said: "A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or intrastate commerce."

In *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, l. c. 214, 54 S. Ct. 402, l. c. 405, it was held: "The Federal Safety Appliance Acts prescribed duties and *injured employees are entitled to recover for injuries sustained through the breach of these duties*" (Italics ours).

To the same effect is *Davis* v. *Wolfe*, 363 U. S. 239, 243, 44 S. Ct. 64, 66; *L. & N. R. R. Co. et al.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 457.

In *T. & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, l. c. 484, the Court said: "A disregard of the command of the statutes is a wrongful act, and *where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied*, according to a doctrine of the common law. * * *."

III.

**The Word "Accident" in Section 8 of the Boiler Inspection Act Does Not Limit the Duty under Section 2 to Making Locomotives "Safe" from "Accidental Injury" So That They May Be Employed Without "Peril to Life or Limb" Solely from "Injury by Force and Violence."**

The Missouri court did not hold that the language of Section 2 of the Boiler Inspection Act reasonably indicated an intention to confine the benefits of that section to accidental injury. The court, to draw this conclusion, looked to the language of Section 8 of the act (45 U. S. C. A., Sec. 32) requiring a written statement to be made "in the case of accidents resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons * * *." Since Section 2 would be entirely operative without Section 8, the latter section cannot limit or restrict

the benefits conferred on employees by Section 2. It will be noted that Section 8 only requires reports of serious accidents from a failure of a locomotive *boiler* or its appurtenances. If requires no report to be made unless there is (1) *an accident*, (2) it is *serious*, (3) it results from a *failure* (4) of a *boiler* and appurtenances. Section 2 places a duty on the railroad as to *the entire locomotive, tender and appurtenances*. Failure of a part is not essential to recovery. *Lilly, supra*. Neither is serious injury.

An almost identical situation is found *In re Claim of A. E. Clark*, 27 Op. At. Gen. 346 (Opinions of Solicitor General, Dept. of Labor, Apr., 1915). In that opinion, Attorney General Wickersham held that the word "injuries" in the first section of the Federal Employees' Compensation Act was not controlled and narrowed by use of the word "accident" in Sections 3 and 4. It was pointed out that the section conferring the right referred broadly to "injuries," while the word "accident" was only employed in section 3 relating to reports and section 4 relating to affidavits in case of death. He held that an injury which came on by slow and imperceptible degrees was covered by the act. A later case under that act is, *In re Claim of Willard E. Jewell*, July 28, 1913, Opinions of Solicitor, Dept. of Labor, Apr., 1915, p. 261. It was there pointed out that at the time of the enactment of the Federal Employees' Compensation Law in 1907, "it is fair to presume that Congress had in mind the fact that under the British Workmen's Compensation Act, occupational diseases were not included as the law was originally passed. This was due to the particular wording of the law, which required in order to recover that there be a 'personal injury by accident' * * *" and those having the preparation of the bill in charge, could not be presumed to have been ignorant of the fact that the term

"injured" was broad enough to cover all cases of incapacity arising in the course of employment.

The Federal Employers' Liability Act and the Boiler Inspection Act form one act for purposes of recovery by interstate employees. In using the words "suffering injury" and "injury" in the Federal Employers' Liability Act it must likewise be presumed that Congress knew the distinction between injuries by accident and injuries that come on by slow degrees. Had it intended to limit recovery to injuries by accident, it must be presumed Congress would have specifically so provided. Had it intended that the benefits of the Boiler Inspection Act were to be limited to injuries by accident, it must be presumed Congress would have amended the Federal Employers' Liability Act or the Boiler Inspection Act to so state.

IV.

## The History and Preamble of the Boiler Inspection Act Are Not to Be Considered in Interpreting the Unambiguous Language of Section 2 of the Act.

Despite its finding that under the unambiguous language of the Boiler Inspection Act, omissions under that act as pleaded and shown by the evidence resulted in petitioner's injury, the Missouri Court considered its preamble and history to reach its conclusion that it was "aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts." In doing so the Court violated the cardinal rules of statutory construction laid down by this Court that the purpose of Statutes as shown by title and history *is immaterial except for the purpose of resolving doubts as to the meaning of words used in the act in case of ambiguity.*

In *Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, 54 S. Ct. 826, the plaintiff sought damages for personal injuries resulting from a collision at a railroad crossing between the automobile she was driving and a train operated by the railroad company. The complaint alleged a violation of the Safety Appliance Acts in failure to maintain an air connection between the engine and cars and to maintain and use the power brakes. The jury found that the statutory violations were proximate causes of the injury. The state appellate court affirmed the judgment. On certiorari to this court the railroad contended that the judgment should be reversed because the Safety Appliance Act was intended only for the protection of employees and travellers upon the railroads. In passing thereon this Court said:

> "Very likely, the primary purpose in the mind of Congress was to protect employees and passengers. So much is indicated by the title—'An act to promote the safety of employees and travelers upon railroads,' etc. And this is borne out by the history of the legislation. * * * But we are asked to hold that the title expresses the sole intent of the act, and this involves a question of statutory construction. *The title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity*" (Italics ours).

In *Tex. & P. Ry. Co. v. Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 484, *Supra*, this court determined that an intrastate employee could recover under the Safety Appliance Act even though it was specifically enacted for the benefit of employees engaged in interstate commerce. In *L. & N. Rd. Co. v. Layton*, 243 U. S. 617, 37 S. Ct. 456, it was held that while the purpose of passing the law requiring auto-

matic couplers was to protect those obliged to go between the cars to couple and uncouple them, the act did not by express terms confine its protection to employees when so engaged and that therefore any employee injured as a proximate result of a failure to comply with the act could recover. In *Davis* v. *Wolfe*, 363 U. S. 239, 44 S. Ct. 64, this Court announced the rule that regardless of whether an employee is engaged in an operation in which the safety appliances are specifically designed to furnish him with protection, he can recover if a failure to comply with the act is the proximate cause of the injury. In *Swinson* v. *C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517, this ruling was cited with approval.

In *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, 260, 89 L. Ed. 921, 933, this court said:

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

In *Brotherhood of Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 529, 91 L. Ed. 1646, 1652, this court said:

> "Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain."

See also *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 58 S. Ct. 426.

V.

## Rules of the Interstate Commerce Commission Have No Bearing on the Construction of the Act.

The court cites various rules promulgated by the Interstate Commerce Commission and concludes, "from these rules it is apparent the Interstate Commerce Commission has looked to the safety of the employee as purposed by the Act from the standpoint of safety from accidental injury in the operation of trains." This has no bearing on a construction of the Act. As this court has said, "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power." *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 613, 47 S. Ct. 207, 210, *supra*.

VI.

## The Federal Employers' Liability Act and the Boiler Inspection Act Are in Pari Materia and Violation of the Latter Constitutes "Negligence" under the Former for Which an Interstate Employee "Suffering Injury" May Recover Damages.

After setting out the pleadings and facts in evidence sufficient to support a finding that petitioner's silicosis resulted from negligence as well as statutory omissions in the care and maintenance of the sanding apparatus and the floors of the cabs of the locomotives, while using mine tailings containing 97% free silicia in sanders and on roadbeds, the Supreme Court of Missouri declared that, "negligence is not the basis for liability under the Boiler Inspection Act" because it "imposes upon the carrier an absolute and continuing duty."

Taking the above as its guide, the court ruled further that the opinions of courts upholding recovery for silicosis, for negligence under the Federal Employers' Liability Act were inapplicable. One of the fallacies of such holding lies in considering the case as though the Federal Employers' Liability Act and the Federal Boiler Inspection Act provide separate and independent rights and remedies.

While the Federal Boiler Inspection Act imposes an absolute duty upon the employer, which supersedes its common law duty under the Federal Employers' Liability Act, it makes no provisions for the nature and incidents of the remedy. *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57, 61, 62, 54 S. Ct. 573, 574, 575; *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402, 406; *Tipton* v. *Atchison, T. & S. Fe Ry. Co.*, 298 U. S. 141, 146, *et seq.*, 56 S. Ct. 715; *Breisch* v. *Central R. of N. J.*, 312 U. S. 484, 85 L. Ed. 964.

When a railroad breaches a duty to an intrastate employee under a Federal Safety Appliance Act, the nature and incidents of the remedy are left to the law of the state where the cause of action arose and the Federal Act is *in pari materia* with the state law. Authorities, *supra*. Had petitioner been injured in intrastate commerce, his right to recovery would have been under the Workmen's Compensation Law of the State of Missouri for fixed compensation rather than "damages," the violation of the act would become immaterial and the nature and extent of the injury the determining factor (Chap. 29, Mo. R. S. A.). *Tipton* v. *A., T. & S. F. Ry. Co., Supra.* Since petitioner was engaged in interstate commerce, *his exclusive right of action is provided by the Federal Employers' Liability Act.* *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 216, 54 S. Ct. 402, 406.

Under that act, an employee in interstate commerce, "suffering injury" becomes entitled to "damages" for "such injury, resulting in whole or in part" from "neg-

ligence" of the carrier or its agents. If the "injury" results in whole or in part from a violation of a Federal Safety Appliance Act, the Federal Employers' Liability Act draws to it the provisions of that act so that both are to be read *in pari materia* and become one act for purpose of construction and application.

By Section 2 of the Boiler Inspection Act, a carrier is "bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide." *B. & O. R. Co. v. Groeger*, 266 U. S. 521, 528, 45 S. Ct. 169, l. c. 172. A violation of this absolute duty becomes "negligence," sometimes called "negligence *per se*," within the meaning of the phrase, "any defect or insufficiency due to its *negligence* in cars, engines, appliances," etc., in the Federal Employers' Liability Act. *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U. S. 476, 36 S. Ct. 626, 630; *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 210, 216, 54 S. Ct. 402, 404, 406; *Lilly v. Grand Trunk R. Co.*, 317 U. S. 480, 87 L. Ed. 411; *McCarthy v. Penn. R. Co.*, (C. C. A. 7) 156 F. 2d 877, 879-880. Since petitioner's exclusive right of action arise under the Federal Employers' Liability Act and the effect of the Boiler Inspection Act is to amend the Federal Employers' Liability Act so that a violation of an absolute duty imposed by the latter act becomes "negligence" within the meaning of the former act, petitioner's right of recovery for the particular injuries sustained must be governed by the former act. The question presented is not whether the Boiler Inspection Act provides a right of recovery for "injury due to the gradual inhalation of harmful dusts" but whether the Federal Employers' Liability Act provides a right of recovery to an interstate employee for such injury caused by the bad order condition of the cab floors and the sanding equipment.

If that question is answered in the affirmative, petitioner may recover since his injuries are proximately

caused by respondent's negligence (violations of the Boiler Inspection Act).

The words "suffer injury" and "injury" as used in the Federal Employers' Liability Act are unlimited and embrace any type of injury. *B. & O. R. Co.* v. *Branson*, (Md.) 98 Atl. 225, 229; *K. C. S. Ry. Co.* v. *Chandler*, (Tex. Civ. App.) 192 S. W. 2d 304, 310.

A liberal interpretation is to be given the Federal Employers' Liability Act because it was designed to enlarge and not restrict the rights of injured workmen. *Jamison et al.* v. *Encarnacion*, 281 U. S. 635, 650, 50 S. Ct. 440, 442.

Silicosis and pneumoconiosis are uniformly held to be injuries. *Rowsie* v. *Thomas F. Jackson*, 196 Atl. 617, l. c. 618; *Marsh* v. *Industrial Commission of Calif.*, 217 Calif. 338, 18 Pac. 2d 933, 936; *Wurst* v. *American Car & Foundry Co.*, (Mo. App.) 103 S. W. 2d 6, 16.

State and Federal Courts have uniformly permitted recovery under the Federal Employers' Liability Act for injuries other than those from "accidental injury" in the sense that the injury is "attended by force or violence." *Baltimore and O. R. Co.* v. *Branson*, 128 Md. 678, 98 Atl. 225 (Paint Poisoning); *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497 (Silicosis); *Atl. Coast Lines* v. *Wheeler*, 147 Va. 1, 132 S. E. 517 (Lead Poisoning); *C., R. I. & P. Ry. Co.* v. *Cheek*, 105 Okla. 91, 231 Pac. 1078 (Creosote Poisoning); *Kansas City So. Ry. Co.* v. *Chandler*, (Tex. Civ. App.) 192 S. W. 2d 304 (repeated minor traumas); *Shelton* v. *Thompson*, 148 F. 2d 1, 157 F. 2d 709 (Carbon Monoxide Poisoning).

The Missouri court impliedly concedes that under the above cases silicosis is embraced within the word "injury" as used in the Federal Employers' Liability Act, but refuses to follow them because they involve common

law negligence rather than negligence *per se*, as a result of violation of a statutory duty.

VII.

**The Petition on First Appeal and on the Present Appeal Stated and the Evidence Disclosed Facts Sufficient to Authorize a Recovery for Negligence under the Federal Employers' Liability Act.**

On prior appeal the Supreme Court of Missouri considered the sufficiency of the allegations of plaintiff's petition to state a cause of action for negligence under the Federal Employers' Liability Act (*Urie* v. *Thompson*, 352 Mo. 211, 176 S. W. 2d 471). In passing on that question the Missouri Court said (l. c. 474, 475) "* * * For the purposes of the demurrer it stands admitted that plaintiff did so acquire silicosis." However, it held, "We do not think it would be reasonable to hold, under the facts admitted by the demurrer, *that defendant should have anticipated plaintiff's injury*, and we, therefore, rule that the petition does not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act" (Italics ours). The court then held that a cause of action for violation of the Boiler Inspection Act was stated and made the following order, "The judgment should be reversed and the cause remanded with direction to set aside the order sustaining the demurrer and dismissing the petition, and it is so ordered." Since that order did not constitute a final judgment, this is petitioner's first opportunity to raise the question in this court. *McComb* v. *County Commissioners*, 91 U. S. 1. 23 L. Ed. 185; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 33 S. Ct. 78.

Since petitioner had set out the basic facts bearing on negligence under the Federal Employers' Liability Act in his petition on first appeal, the ruling of the Supreme Court of Missouri on the question of recovery for negligence under the Federal Employers' Liability Act became the "law of the case" and petitioner and the trial court were bound by the opinion and in conformity to it, petitioner and the court were limited to submitting the case on violations of the Boiler Inspection Act. *Creason* v. *Harding*, 344 Mo. 452, 126 S. W. 2d 1179, 1183, 1184; *Smith* v. *Smith*, (Mo. App.) 192 S. W. 2d 691, 697.

Although petitioner did not have a right of review by this court on prior appeal, this court has not lost its jurisdiction to review the holding on that appeal. In *Louisiana Navigation Company* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 33 S. Ct. 78, the precise question was involved. The trial court had sustained a demurrer to the petition. The Supreme Court of Louisiana on appeal held that the petition stated a cause of action as to certain lands, but no cause of action as to other land, and the case was remanded to the trial court. Plaintiff sued out a writ of error to this court and suggested that the right to review by this court would be lost as to that part of the cause of action which the Louisiana Supreme Court said was without merit if this court did not review the case because the opinion would become the law of the case and binding upon the Louisiana courts. In passing thereon this court said:

> "The rule which excludes the right to review questions arising in a cause depending in a state court until a final judgment is rendered by such court *involves as a necessary correlative the power and the duty of this court when a final judgment in form is rendered and the cause is brought here for review, to consider and pass upon all the Federal controversies in the cause*, irrespective of how far it may be that

by the state law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered. *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 214, 53 L. Ed. 765, 768, 29 Sup. Ct. Rep. 430" (Italics ours).

The petition on first appeal specifically termed the acts alleged as "negligent."

On the trial from which this appeal arose, the pleadings, the facts in evidence as set out in the opinion and the findings required, particularly by Respondent's instruction R (R. 13-14) were sufficient to place in issue and support a finding that petitioner's silicosis resulted at least in part from respondent's negligence even though they are not specifically called "negligent."

The petition on prior appeal alleged that over a period of years the respondent used in the sanding devices on its locomotives a sand material containing a very high percentage of silica, and that the sanders were in such condition that when put in operation excessive and unnecessary quantities of sand would frequently come from the sanding devices on the rails and be ground to dust and "dust containing such usual and unusual quantities of silicon dioxide would come from such use and into the locomotives where plaintiff worked and frequently of unusual quantity and such quantity would be breathed by him * * * and that over a p[illegible] of time such breathing of such dust was dangerous [illegible] the health and life and would likely cause to plaintiff the condition resulting to plaintiff" (R. 44). The amended petition alleged additionally that the sanding devices were worn, out of adjustment, loose and broken and that the decks of the locomotives were old, worn, loose, bent, warped and contained open spaces, and that silica sand used on the roadbeds was also drawn into the cab (R. 2-4). The allegations and evidence that such conditions were permitted to exist over a period of years clearly constitutes such com-

mon law negligence as will authorize a recovery under the Federal Employers' Liability Act. Numerous State and Federal Court decisions which authorize recovery under the Federal Employers' Liability Act for exposure to poisonous and noxious substances have been set out under Point VII herein. In *Sadowski* v. *L. I. R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497, recovery under the act was permitted for silicosis. In *Shelton* v. *Thompson*, 148 F. 2d 1; 157 F. 2d 709, recovery was permitted for carbon monoxide poisoning. In *B. & O. R. Co.* v. *Branson*, 128 Md. 678, 98 Atl. 225, recovery was allowed for paint poisoning. In *C., R. I. & P.* v. *Cheek*, 105 Okla. 91, creosote poisoning was made the basis for recovery and in *Shelton* v. *Thompson*, 148 F. 2d 1; 157 F. 2d 709, recovery was allowed for carbon monoxide poisoning.

The prior opinion in this case held that even though unusual quantities of silica dust was drawn into the cabs over a period of years causing silicosis this could not be made the basis of recovery "because it would not be reasonable to hold * * * that defendant should have anticipated plaintiff's injury." The last opinion in *Sadowski* v. *L. I. R. Co.*, *supra*, was not reported at that time. The present opinion would seem by inference to overrule the holding on the prior appeal as to common law negligence as well as the holding as to recovery for violations of the Boiler Inspection Act. It recognizes that recovery was authorized under the Sadowski case because "defendant should have taken precaution to prevent plaintiff from the consequences which might reasonably be anticipated from being required to work 'in more or less of a cloud of silica dust which enveloped him and which he necessarily inhaled'" (R. 28).

There is no less reason in the present case for holding that petitioner's condition might reasonably be anticipated from being required to work in an engine cab in silica dust which he necessarily inhaled. The court in the

present opinion, however, said the Sadowski case was not helpful in determining "whether a socalled occupational disease as distinguished from accidental injury is within the protection designed and could be afforded under the Boiler Inspection Act."

This court should take jurisdiction of this case to reconcile the first Missouri opinion with the conflicting opinions from other state and federal courts. Under the facts as alleged in both petitions, respondent should be charged with reasonably anticipating that petitioner might be injured from being required to inhale quantities of high content silica dust used by them in sanders and on the roadbed, and which was drawn into his working place through unnecessary openings where he was required to inhale it over a period of years.

The opinion in principle is in conflict with the recent opinion of this court in *Lillie v. Thompson*, 92 L. Ed. Ad. Op. 115, where it was held that a railroad which employed a young woman telegraph operator in a frame building, in an isolated part of its yards, might reasonably anticipate that she would be assaulted by third parties not employed by the railroad.

Wherefore petitioner respectfully submits that certiorari should be granted to the end that the opinion of the Supreme Court of Missouri on questions involving the construction and administration of the Federal Employers' Liability Act and Safety Appliance Acts be harmonized with the decisions of this court.

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# APPENDIX.

## The Federal Employers' Liability Act

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) are as follows:

Sec. 51. Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence: Definition of Employees

Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee: * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as entitled to the benefits of this chapter. Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Sec. 53. CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES.

In any actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; PROVIDED, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

Sec. 56. ACTIONS; LIMITATION; CONCURRENT JURISDICTION OF COURTS; REMOVAL OF CASE IN STATE COURT

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

The pertinent provisions of the Federal Safety Appliance Act, usually known as the Boiler Inspection Act (45 U. S. C. A., Sec. 23 *et seq.*) are as follows:

Sec. 23. USE OF UNSAFE LOCOMOTIVES AND APPURTENANCES UNLAWFUL; INSPECTION AND TESTS

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and

unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, Sec. 2, 36 Stat. 913; Mar. 4, 1915, c. 169, Sec. 1, 38 Stat. 1192; June 7, 1924, c. 355, Sec. 2, 43 Stat. 659.

Sec. 32. REPORT BY CARRIER TO DIRECTOR AS TO ACCIDENT; PRESERVATION OF DISABLED PARTS; INVESTIGATION AND REPORT THEREUPON

In the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the director of locomotive inspection. Whereupon the facts concerning such accident shall be investigated by the director of locomotive inspection or one of his assistants, or such inspector as the director of locomotive inspection may designate for that purpose. And where the locomotive is disabled to the extent that it cannot be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The director of locomotive inspection or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the director of locomotive inspection. Feb. 17, 1911, c. 103, Sec. 8, 36 Stat. 916; Apr. 22, 1940, c. 124, Sec. 1, 54 Stat. 148.

Pertinent rules of the Interstate Commerce Commission.

101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control.

116 (a) Cabs shall be securely attached or braced and maintained in a safe and suitable condition for service. Cab windows shall be so located and maintained that the enginemen may have a clear view of track and signals from their usual and proper positions in the cab.

120. Sanders.—Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails.

Congressional debates on the Boiler Inspection Law. (Cong. R. Vol. 46, part 1, p. 729, January 10, 1911)

"Mr. Cummins: Mr. President, inasmuch as I happened to be the chairman of the subcommittee which reported the bill and am therefore quite familiar with that part of it. * * *

* * * There is a very marked difference between rendering a boiler in use unlawful, subject to prosecution before a grand jury, and the inspections which are provided for in Section 5. * * *

Mr. Cummins: The Senator from Idaho totally, I think, misconceives the operation of the statute. It consists of two parts. First, it declares that it shall be unlawful for any common carrier to use a boiler unless it be in a safe condition. That is a general obligation resting upon the railroad companies entirely distinct from any inspection that may ever occur.

The second part of the bill creates a system of inspection under the chief inspector and district in-

spectors and the rules and regulations which are provided for in Section 5 are those which relate to the inspection that shall be made by the railroad companies themselves of their boilers. This is simply a provision from which it is hoped there will follow greater care upon the part of the railroad companies in the inspection of their boilers, and that there will be some uniformity in the rules relating to those inspectors. But Section 2 would be entirely operative if no part of the bill which follows Section 2 were enacted"